Before the
Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
	)	

Motion for Leave to File Late

The Public Service Commission of Wisconsin ("Commission") respectfully moves the Federal Communications Commission ("FCC") for leave to file late the attached reply comments in this docket.

Upon initial review of the materials in this docket, the Commission determined that it would not submit initial comments to the FCC. However, after reviewing the initial comments submitted, and given the extensive work currently taking place in the SBC/Ameritech region regarding Operational Support Systems, the Commission determined that the attached reply comments should be developed and submitted for use in this docket. The Commission staff was

unable to review the voluminous initial comments in time to comply with the original filing deadline.

Accordingly, the Commission respectfully requests that the FCC grant leave to file reply comments late, and accept the accompanying reply comments in this docket.

Dated at Madison, Wisconsin, February 19, 2002.

By the Commission:

/s/ Lynda L. Dorr

_____

Lynda L. Dorr
Secretary to the Commission

LLD:srd:T:\federal\fcc\comments\01-318PMNPRM replycomments020502 cover.doc

Before the
Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
	)	

Reply Comments of the
Public Service Commission of Wisconsin

On November 19, 2001, the Federal Communications Commission (FCC) released a Notice of Proposed Rulemaking (NPRM) in the above-captioned docket. The FCC specifically seeks comments on whether it should adopt a select group of measurements and standards for evaluating incumbent local exchange carrier (ILEC) performance in the provisioning of facilities that are used by their carrier-customers to compete for end-user customers. In response to the Public Notice and in accordance with Section 1.51(c) of the FCC's rules, 47 C.F.R. §1.51(c), the Public Service Commission of Wisconsin (Commission) submits its Reply Comments for inclusion in the public record.

I. Overview

The FCC states that its goals for this rulemaking are to create certainty as to whether carriers are adequately providing interconnection and access to unbundled network elements (UNEs), to reduce reporting and compliance costs for carriers, and to establish specific enforcement goals and guidelines, including remedies.

In these comments the Commission addresses both the policy and jurisdictional questions raised by the FCC. The Commission is specifically addressing arguments expressly or tacitly supporting FCC jurisdiction to promulgate national performance measures and national standards, such as those contained in portions of the comments of Verizon Communications, Inc.,[1] and the Association for Local Telecommunications Services[2] (ALTS). The Commission supports the comments filed by the National Association of Regulatory Utility Commissioners (NARUC) in this proceeding.

In attempting to create national standards to further the FCC's goals for this rulemaking, the FCC may set back the arduous and expensive undertaking of the many state commissions that have already looked at the issue and that have established specific and workable enforcement goals and guidelines, including remedies. National standards may not adequately address the needs of state-specific competitors purchasing wholesale services (interconnection and UNEs) using state specific processes and/or provider-specific operational support systems. To the extent that any comprehensive set of nationwide standards is incompatible to the systems and business practices of a particular ILEC may further burden an ILEC that has expended resources demonstrating how its systems and practices compare to state adopted standards.

---

[1] See Verizon Comments, p. 47-48, suggesting FCC, in national measurements, may strike "optimal balance between competition and regulation," and differing state standards could be preempted. The balance of Verizon's Comments on jurisdiction, p. 49-51 raise substantial questions regarding the scope of FCC jurisdiction.

Specifically, nationwide standards may compromise or even undo extensive work already performed in the five-state SBC/Ameritech region through collaboration with Ameritech and its competitors and adopted by the Commission.

II. Ameritech Wholesale Performance Measures

The Commission opened an investigation into the Operational Support Systems (OSS) of Ameritech Wisconsin in November 1999. During that investigation, the Commission staff worked with Ameritech, competitive local exchange companies (CLECs) and the regulatory agencies of other states in which Ameritech operates to develop a series of performance measures and standards as well as to develop a list of other issues that Ameritech was required to fix before OSS third party testing could commence. Many of those factors deal specifically with Ameritech's OSS and business practices, such as the manner in which Ameritech's technicians performed hot cuts, and the interactions between Ameritech, the ILEC, and Ameritech's directory publishing affiliate. The investigation developed a series of over 100 performance measures and benchmarks that monitor various facets of the Ameritech OSS that are critical to competitors' ability to use wholesale services in a timely manner. These performance measures subsume and, where appropriate, go beyond the proposed national wholesale standards.

Because the collaborative process involved not only the CLECs and Ameritech, but also the cooperation of the regulatory agency staffs in all five Ameritech states, the performance measures and benchmarks that were approved are generally consistent across Ameritech's entire five-state service area. The few differences reflect unique Ameritech practices in each state, or reflect Ameritech's compliance with state-specific requirements.

---

[2] See ALTS Comments, p. 11-13.

Every six months, Ameritech, CLECs, and staff from each state commission review the performance measures within the Ameritech region. Each state commission then independently decides whether it will adopt, modify, or reject the proposed changes. The first six-month review resulted in proposed changes that were uniform across the region. If the FCC were to adopt national standards, the first opportunity this Commission would have to implement those standards would be at the next available six-month review following the effective date of the standards.

The Commission believes that the FCC can reduce the regulatory burden of ILECs if performance measures and benchmarks for a given ILEC are relatively uniform across its entire operating area, with state-specific variations necessary only where state-specific requirements or practices vary. The Commission believes that the process by which standards for Ameritech have been developed and implemented by the five state regulatory agencies who oversee Ameritech operations has met that goal.[3]

National standards also burden CLECs that have worked closely with the staffs of the Ameritech states to ensure that the CLECs can order, maintain, and use the wholesale elements sold by ILECs in a timely and useful manner. The most critical factor for the CLECs is whether the performance measures and benchmarks closely monitor all critical elements of the ILEC's OSS. If a performance measure or benchmark does not account for a unique circumstance of a given ILEC[4], then the performance measures and benchmarks may not adequately ensure that the CLEC can operate.

---

[3] The Commission has not yet established performance measures for other Wisconsin ILECs. If and when the Commission undertakes that effort, it would look to measures adopted in other jurisdictions for the specific ILEC, if any, and any national standards in effect.

[4] For example, Ameritech's directory operations are provided by a separate affiliate, not by the ILEC, and thus required a separate OSS interface.

III. Jurisdiction

The FCC's NPRM is essentially a proposal for the establishment of service quality rules respecting interconnection arrangements for the local exchange service. Local exchange service quality has been the province of state commissions for decades, and the Telecommunications Act did not preempt that state jurisdiction.

A. The FCC's NPRM Seeks to Establish Service Quality Rules.

The FCC describes the issues as the creation of "performance measurements" and "performance standards"[5] for pre-ordering, ordering, provisioning, and maintenance [NPRM, ¶ 1] for four unbundled network elements: collocation, loop, transport, and interconnection trunks. The foregoing is merely an elaborate, indirect way of stating that the FCC is considering proposing service quality standards for the named UNEs. Without much debate, the industry views the establishment of the metric or the standard (e.g., parity) for a particular UNE as establishing its quality. Once a state commission establishes a "number" for a performance measure or a parity standard by which the carrier's performance is judged, the state has set the minimum quality level required of the provider. The terminology of the FCC is in fancy dress, but the underlying concept is service quality—which the state commissions have been addressing in the intrastate sphere for the past 90 or more years.

B. Congress Did Not Give the FCC Jurisdiction Over Service Quality.

Despite its assertion of authority based upon 47 U.S.C. § 201(b) and *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 (1999), the FCC has not been granted jurisdiction by Congress over intrastate service quality matters.

---

[5] See definitions in NPRM, footnote 2.

First, the plain language of the Communications Act, as amended by the Telecommunications Act of 1996 (Act), shows no express grant of exclusive jurisdiction over intrastate service quality—even in the context of enforcing interconnection agreements under §§ 251 and 252. Without express preemption language, the Act itself provides that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede . . ., State, or local law unless expressly so provided in such Act of amendments." Section 601(c)(1), codified as a note at 47 U.S.C. § 152.

ALTS focuses upon the "just and reasonable" standard in § 251(c) (3) as providing the FCC with jurisdiction, along with §§ 201 and 202 of the Communications Act of 1934.[6] ALTS, however, takes the standard out of context. The ILEC is given a duty in § 251(c) to provide interconnection with the ILEC's network "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252." (emphasis added.) This is a statement of the ILEC's duty, not a grant of jurisdiction to the FCC. The "just and reasonable" terms and conditions of an interconnection agreement, whether adopted by voluntary negotiation or arbitration, are subject to state commission approval or rejection pursuant to § 252(e). That subsection, in turn, specifically reserves in the approval process the power of the state commission to set service quality, notwithstanding the Congress' detailed specification of state commission approval authority over interconnection agreements in § 252(e)(2). Section 252(e)(3) states:

> 3) PRESERVATION OF AUTHORITY. Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an

[6] ALTS Comments, p. 11-12.

> agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. (emphasis added).

Congress explicitly reserved "service quality" to the state commissions.[7] Section 253(b), subject to the conditions of necessity and competitive neutrality, states that despite the removal of state prohibitions on competition, "[n]othing . . . affect[ed] the ability of a State to impose . . . requirements necessary to . . . ensure the continued quality of telecommunications services . . . ." This conscious reservation of state jurisdiction over service quality standards, even in the context of interconnection agreements upon which FCC jurisdiction is predicated. This explicit reservation of state service quality jurisdiction is reiterated a few paragraphs later in § 252(f) regarding statements of generally available terms from a Bell Operating Company. Section 252(f)(2) explicitly states:

> Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements. (emphasis added).

The FCC cites to *AT&T Corp.*, 525 U.S. at 378, for the holding that Congress gave it rulemaking authority in § 201(b) to implement the local competition provisions of the Act. But the FCC's brief citation omits the nuances and limitations in the Supreme Court's holding in *AT&T Corp.*:

> We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include §§ 251 and 252, added by the Telecommunications Act of 1996. N.6.
>
> * * *
>
> N.6. JUSTICE BREYER appeals to our cases which say that there is a "'presumption against the pre-emption of state police power regulations,'" *post*, at 10, quoting from *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992), and that there must be "'clear and manifest'

[7] The one reasonable exception, as pointed out in Verizon Comments, p. 49, is the FCC's specific jurisdiction in § 271(d)(6) to assure BOC compliance with § 271 after receiving approval. To install FCC standards for § 271 enforcement would add "another layer of regulation." *See* Verizon Comments, p. 51.

> showing of congressional intent to supplant traditional state police powers," *post*, at 10, quoting from Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947). But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. (emphasis added).

The Supreme Court's literal interpretation of § 201(b) focused upon §§ 251 and 252 as defining "matters" of "local telecommunications competition" that have been taken away from the States and given to the FCC. *AT&T Corp.* does not support the conclusion that use of § 201(b) in the name of promoting interconnection standards to advance local competition includes taking away state commission jurisdiction over service quality retained in § 253(b).

In this NPRM, the issue has crossed the line from competition to service quality. The issue of service quality, unlike issues of competition, was not directly addressed in *AT&T Corp.* because the matter is set apart in § 253, a separation carefully recognized even in § 252(e)(3) and (6). Consequently, the FCC is properly assuming that jurisdiction over competition includes jurisdiction over service quality. Service quality is not part of competition matters taken from the states, but apart from it—and still reserved to the states.

C. Service Quality is Reserved to the States under § 152(b).

The reservation of state jurisdiction over service quality is reinforced by the remaining functionality given § 152(b)[8] by the Supreme Court's harmonization of its holding in *AT&T Corp.* and its prior holding in *Louisiana Pub. Serv. Comm. v. FCC*, 476 U.S. 355 (1986). In *Louisiana*, according to the majority in *AT&T Corp.*

[8] § 152 (b): "Except as provided in sections 223 through 227 [47 USC §§ 223-227], inclusive, and section 332 [47 USC § 332], and subject to the provisions of section 301 [47 USC § 301] and Title VI [47 USC §§ 521 et seq.], nothing in this Act [47 USC §§ 151 et seq.] shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, ..."

> "[Section] 152(b) prevented the [FCC] from taking intrastate action solely because it furthered an interstate goal. 476 U.S., at 374.[N. 8]
>
> * * *
>
> N.8. . . . After the 1996 Act, § 152(b) may have less practical effect. But that is because Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control. Insofar as Congress has remained silent, however, § 152(b) continues to function. The Commission could not, for example, regulate any aspect of intrastate communication *not* governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction. (emphasis added).

AT&T Corp. 525 U.S. at 381-82.

The FCC's proposal for national rulemaking on intrastate service quality to "further a Commission of fostering facilities-based competition while promoting simultaneously competition, innovation, and deregulation," NPRM, ¶ 5. This goal is no different than the FCC's goal to enhance interstate competition in *Louisiana*. In each situation, purported ancillary effects are presented to justify FCC jurisdiction. The only difference here is that the effort is in service quality rather than state depreciation rates.

Section 152(b) continues to function in the area of service quality because it has not been exclusively taken from the states by the Act. The FCC may not treat service quality as ancillary to its competition promoting goals and proceed to preempt state service quality jurisdiction. For the FCC to do so would remove all remaining meaning from § 152(b) and violate § 601(c)(1) of the Act. Congress did not repeal that section in 1996, and the Supreme Court still treats it as valid under *Louisiana* and *AT&T Corp.*

The FCC does not have jurisdiction to promulgate performance measures and performance standards for UNEs in this NPRM.

D. Only § 252(d) Permits the FCC to Preempt a State Service Quality Standard, and Then Only on a Case-by-Case Basis If the State Standard Amounts to a Barrier to Competition in Violation of § 253(a).

The instant NPRM is not permitted to the FCC as the means of preempting state service quality assuming a state action violates the conditions on state service quality requirements in § 253(b). Section 253(d) plainly defines the preemption procedure to be followed by the FCC:

> (d) PREEMPTION. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Congress could not be clearer. States start with a right to regulate service quality, and the FCC may only terminate it upon a showing of violation of the conditions of necessity and competitive neutrality in § 253(b). And even then, the preemption is permitted only "to the extent necessary to correct such violation or inconsistency."

This is the balance between state regulation and FCC oversight that Congress struck, no doubt in the interests of inducing state participation in the Act's "cooperative federalism." If the FCC asserts the rulemaking power here on service quality, then § 253(a) and (d) are basically read out of the Act. The implications of that reading would hardly advance the scheme crafted by Congress.

IV. Conclusion

National standards can form a baseline or act as guidance for state commissions in setting performance measures and benchmarks, but they are not substitutes for, nor should they replace, well-crafted, state- and company-specific standards. Insofar as the FCC attempts to create performance measures and standards, any such performance measures and standards amount to service quality rules over which the FCC lacks jurisdiction. If the FCC finds that it does have

jurisdiction to establish and impose specific performance measures and standards on states, the FCC should take care that any national standards not prevent the states from tailoring those standards to fit each individual ILEC's operations. The FCC should also avoid adopting any standards that have the effect of preempting, in whole or in part, existing state standards. Such a result may undo extensive and costly work in the Ameritech region as already described above and set back competition at least two years.

Dated at Madison, Wisconsin, February 19, 2002.

By the Commission:

/s/ Lynda L. Dorr

_____

Lynda L. Dorr
Secretary to the Commission

LLD:srd:T:\federal\fcc\comments\01-318PMNPRM replycomments020502